

NO. 94209-9

SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT
COURT, EASTERN DISTRICT OF WASHINGTON

JIN ZHU,
Plaintiff-Respondent,

v.

NORTH CENTRAL EDUCATIONAL SERVICE DISTRICT –
ESD 171
Defendant-Appellant.

PLAINTIFF'S RESPONSE TO BRIEFS OF AMICI CURIAE

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I. RESPONSE TO AMICI CURIAE

Plaintiff-Respondent Zhu concurs with and adopts all arguments made, and stands ready to discuss all authorities cited, in the amicus curiae briefs filed by the Washington State Association for Justice Foundation, Washington Employment Lawyers Association, and the American Civil Liberties Union of Washington. These briefs correctly describe the strong legislative intent and public policy in favor of protecting job applicants from retaliation, the large body of case law supporting this position, and the potentially devastating consequences of failing to protect job applicants from retaliation. This response addresses a few points raised by amici that warrant further discussion.

A. Victims Of Discrimination Would Not Be The Only Persons Deterred From Opposing Discrimination If Not Protected From Future Retaliation.

Amici correctly point out that a failure to protect victims of discrimination from retaliation in future employment with different employers would have a chilling effect and deter victims from coming forward. Not discussed, however, is the fact that victims of discrimination are not the only people at risk of retaliation based on opposition to forbidden practices. Witnesses to alleged discrimination and anyone else who assists in rooting out discrimination are also vulnerable to retaliation.

It is beyond dispute that non-party witnesses often provide indispensable and dispositive testimony relied upon by the finder of fact, and that without these witnesses the justice system cannot hope to arrive at the truth. In discrimination cases, witnesses often include family members, former and current coworkers, and supervisors of the alleged victim—individuals who are generally without a personal claim for damages and thus have nothing to gain from participating in a case other than seeing justice done. Importantly, these witnesses usually testify for *both parties* in a case, helping to both root out discrimination as well as identify false claims. But under the rule Defendant asks the Court to adopt, these witnesses would be forced to risk their careers in order to do what is right.

If, as Defendant proposes, retaliation laws only apply to the employer who is alleged to have discriminated, all witnesses who work for a different employer than the victim could legally be immediately fired for their participation in the litigation. Witnesses who work for the same employer as the victim would be protected from retaliation for as long as they continued to work there, but could legally be blacklisted in all future employment. It is difficult to imagine that many witnesses would be willing to come forward at such a high personal cost. Both plaintiffs and defendants would thus be hindered in their ability to prove the merits of their case.

In short, Defendant asks the Court to reach a holding that puts the effectiveness of the entire justice system at risk. The Court should instead encourage witness testimony by protecting parties and witnesses from all forms of retaliation, as the legislature intended.

B. Discussion of Other Statutory Schemes is Unnecessary.

Amicus Washington Employment Lawyers Association provides an analysis of persuasive authority from other jurisdictions, focusing primarily on *Carter Coal Co. v. Human Rights Com'n*, 261 Ill.App.3d 1, 633 N.E.2d 202, 198 Ill.Dec. 740 (5 Dist. 1994). (WELA Brief, pp. 13-15). While *Carter Coal* is indeed persuasive due to its factual similarity to the case at bar and the strong reasoning behind its holding, and is in fact discussed in the Brief of Respondent, a more applicable case that is missing from the amicus brief is *Sada v. Robert F. Kennedy Med. Ctr.*, 56 Cal. App. 4th 138, 65 Cal. Rptr. 2d 112, 126 (1997). Plaintiff asks the Court to rely more heavily on the latter case.

The *Sada* case is particularly helpful because California's antidiscrimination law is almost identical to the WLAD, and because the decision squarely addressed the issue presented here and determined that the law protected job applicants from retaliation based on prior protected activity. 56 Cal. App. 4th at 159-160. This case also disproves Defendant's argument that no other state with a statute similar to the

WLAD has held that job applicants are protected from retaliation. Defendant appears to recognize this: while its Reply Brief meticulously addresses virtually every other case cited by Plaintiff, it conspicuously ignores the *Sada* case and offers no reasons why this Court should not adopt its holding or reasoning.

Thus, while cases such as *Carter Coal* are helpful, a lengthy discussion of cases analyzing different statutory schemes is unnecessary when ample binding and persuasive precedent is available. The case at bar is best decided by the plain language of the WLAD and the many Washington, Federal, and California cases dealing with factual scenarios and statutory provisions that are similar or identical to the case at bar. These authorities universally hold that in order for antidiscrimination laws to be effective, job applicants must be protected from retaliation for opposing discrimination in previous employment. The Court should adopt this holding in the present case.

II. CONCLUSION

The briefs of amici curiae are well founded and correct. The Court should hold that RCW 49.60.210(1) creates a cause of action for job applicants who claim a prospective employer refused to hire them in retaliation for prior opposition to discrimination against a different employer, and award Mr. Zhu attorney fees and costs on appeal.

Respectfully submitted this 22nd day of August, 2017.

A handwritten signature in cursive script that reads "Andrew S. Biviano".

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 2017, I caused to be served a true and correct copy of the foregoing Plaintiff's Response to Briefs of Amici Curiae on the following counsel of record by email:

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